

Council for American Private Education

CAPE outlook

Voice of America's private schools

Supreme Court Hears Blaine Amendment Case

The State of Missouri excluded a preschool program operated by Trinity Lutheran Church of Columbia from a scrap tire recycling program that would have made its playground surface safer. It did so solely because “the preschool is operated by a church rather than a secular not-for-profit.” The state thus violated the Free Exercise Clause of the First Amendment of the U.S. Constitution by “imposing special disabilities on the basis of religious views” and “forcing a choice” between the exercise of religion and receipt of a government benefit.

That’s as far as David Cortman got in his opening statement to the Supreme Court of the United States in *Trinity Lutheran Church of Columbia, Inc. v. Comer* before Justice Anthony Kennedy interrupted with the first of an extended series of probing questions by the justices—questions designed to determine exactly where the facts fit within the space between the constitution’s prohibition against the government establishing a religion and its protection of the free exercise thereof.

Far-Reaching Implications

The outcome of the case could have far-reaching implications for programs of state aid to students in religious schools. It hinges on the state’s Blaine Amendment, which provides that “no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion....” During oral arguments, Justice Sonia Sotomayor noted there are “39 states with constitutional amendments like the one Missouri has,” so a broad ruling by the court could send shock waves across the nation.

Cortman, senior counsel with the Alliance Defending Freedom and the representative of Trinity Lutheran in the case, responded skillfully to the court’s multiple inquiries. Justice Kennedy asked him whether states could ever use religious sta-

tus to deny state benefits to an individual or organization. “Why would someone’s religious status matter in the first place to receiving a government benefit?” Cortman wondered.

In response to a point by Justice Ruth Bader Ginsburg that the constitution prohibits the use of tax money to pay for churches, Cortman drew the distinction in case law between the funding of explicitly religious activities and the funding of secular activities by a religious organization.

All but two justices (Ginsburg and Sotomayor) seemed at least somewhat sympathetic to the church’s claim of discrimination. Justice Elena Kagan, for example, conceded that the church was on “strongest ground” with its charge that the state had decided to fund some activity but had denied the same funding “to a particular party based solely on that party’s religious status.” At the same time, however, she made clear a state could prohibit the use of funds for religious activity and could even take some measures to make sure the funds were not diverted toward such activity.

Police Protection

In an exercise of jurisprudential common sense, Justice Stephen Breyer identified a series of services provided to religious institutions that state Blaine amendments don’t seem to prevent: police and fire protection, crossing guards, health services. He asked James Layton, who represented the state, “[D]oes the Constitution of the United States permit a state or a city to say, we give everybody in this city police protection, but not churches? We give ev-

erybody fire protection, but let the church burn down. We give everybody public health protection, but not a church.” He continued, “If it does not permit a law that pays money out of the treasury for the health of the children in the church...

how does it permit Missouri to deny money to the same place for helping children not fall in the playground, cut their knees, get tetanus, break a leg, et cetera? What’s the difference?”

Pursuing a similar line of questioning, Justice Samuel Alito asked whether the Missouri constitution would allow the use of state funds to protect religious schools against a heightened risk of a terrorist attacks, or to repair church buildings that are destroyed by bombings, or to enhance security at religious schools—forms of aid previously approved by Congress or other jurisdictions. In the same vein, Chief Justice Roberts asked whether the state could deny tours of the state capitol to students from religious schools while providing the service to other students.

One issue addressed by several justices was whether the case was moot in light of a decision days before by Missouri Governor Eric Greitens to reverse the state’s policy and allow religious organizations to receive the scrap tire grants.

Both attorneys argued that the case should move forward. Layton explained that a taxpayer lawsuit against the new policy could keep the constitutional question alive, as could a reversal of the policy by the state’s next governor.

A decision is expected by late June.

[photo © Gudellaphoto/Dollar Photo Club]



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- Agudath Israel of America
- American Montessori Society
- Association Montessori International—USA
- Association of Christian Schools International
- Association of Christian Teachers and Schools
- Association of Waldorf Schools of N.A.
- Christian Schools International
- Council of Islamic Schools in North America
- Council on Educational Standards and Accountability
- Evangelical Lutheran Church in America
- Friends Council on Education
- Jesuit Schools Network
- Lutheran Church—Missouri Synod
- National Association of Episcopal Schools
- National Association of Independent Schools
- National Catholic Educational Association
- National Christian School Association
- Oral Roberts University Educational Fellowship
- Seventh-day Adventist Board of Education
- United States Conference of Catholic Bishops
- Wisconsin Evangelical Lutheran Synod Schools
- Affiliated State Organizations

a coalition of national associations serving private schools K-12
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Not All Students Exposed to Art and Music Education

Art and music education are critical components of the curriculum in many schools, though apparently not all.

The National Center for Education Statistics (NCES) reported on April 25 results from an assessment of music and visual arts achievement that took place in 2016. The Nation's Report Card, as it's called, showed that 63 percent of public and private school eighth-graders across the country said they had taken a music class during 2016, while only 42 percent said they had taken an art course. Percentages varied by type of school, with 67 percent of private school students and 62 percent of public school students reporting that they had taken a music class in school, and 62 percent of private school students and 41 percent of public school students saying they had taken an art course.

Performance

Performance levels on the assessments varied as well. The average score in music for students in private schools was 160 on the test's 300-point scale, and for students in public schools it was 146. In visual arts, the private school and public school scores were, respectively, 164 and 148.

The private school/public school score gap was not the only divide identified in the NAEP report. Female students scored higher than male students in both music, where the gap was 15 points, and visual arts, where the gap was 14 points. In addition, suburban students outperformed city students by 13 points in music and 8 points in visual arts, and students not eligible for the National School Lunch Program (NSLP) outperformed NSLP-eligible students by 26 points in music and 22 points in visual arts.

According to NCES, the National Assessment of Educational Progress (NAEP) "is the only national assessment that measures what students know and can do in music and visual arts." It was administered to approximately 8,800 students in public and private schools, sampled to represent all eighth-graders across the nation.

What Was Measured?

The test not only measured students' "knowledge about the arts" but also "their ability to create art." The music portion invited students "to

analyze and describe aspects of music they heard, critique instrumental and vocal performances, and demonstrate their knowledge of standard musical notation and music's role in society."

For the visual arts component, they "analyzed and described works of art and design and were also asked "to create original works of art and design, including a self-portrait that was scored for identifying detail, compositional elements, and use of materials."

NCES provides examples of the knowledge and skills demonstrated by students at particular performance points on its 0-300 point scale.

For example, eighth-graders scoring 168 in music, which is close to the private school average, would likely be able to "identify a bass clef symbol." At the 152 performance point, which is close to the national average of 147, students would likely be able to identify the length of a particular musical composition.

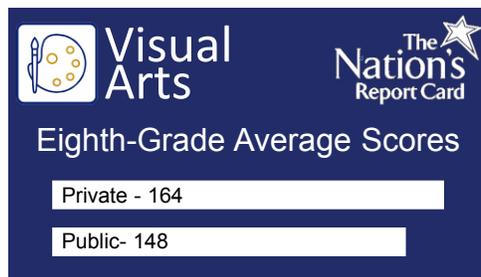
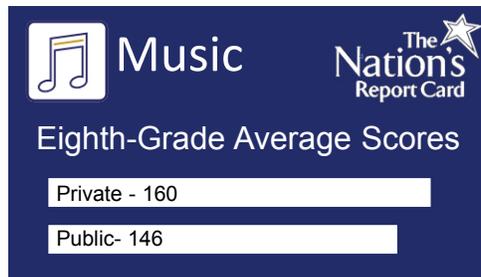
In visual arts, students with an average score of 155 would likely be able to explain how an artist "used light to create a lack of realism" in a given

portrait, and at the 152 level they would likely be able to "explain the relationship between technical approach and meaning in an artist's self-portrait." Students scoring at any particular level "would also be likely to correctly answer questions associated with a score lower than" that level.

Trends

In an overview of the results from the latest NAEP assessments, NCES indicated, "Overall achievement in music and visual arts for the nation's eighth-graders has remained the same since 2008." In addition, "Enrollment in arts courses and engagement in school arts activities remained unchanged for the nation's eighth-graders between 2008 and 2016."

At the same time, however, students were less engaged in music and art activities during after-school hours than they were eight years ago. As Peggy Carr, the acting commissioner of the NCES, observed, "We are noticing...that students are less likely to participate in activities such as taking art classes or playing a musical instrument outside of school."



Arizona Greatly Expands ESA Program

Arizona Governor Doug Ducey made history April 6 when he signed legislation that will eventually extend eligibility for Empowerment Scholarship Accounts (ESAs) to every public school student in the state. The pool of eligible students will be phased in by grade level between 2017 and 2020, and the number of new ESA recipients each year will be capped at 0.5 percent of total public school enrollment (about 5,500 students) through 2022, ending in a permanent total cap of roughly 30,000 students.

The new law will likely make Arizona the first state to have a fully functioning ESA program to which every student currently enrolled in public school may apply. (Last year Nevada enacted an ESA bill with broad eligibility, but the program was sidetracked when the state supreme court said the funding mechanism violated the state's constitution.)

National Pioneer

In 2011, Arizona was the first state in the country to launch an ESA program, which initially served only students with special needs. Over the years it has expanded to include children in failing public schools, in foster care, from military families, or on Indian reservations.

Under Arizona's program, the state deposits funds into accounts that parents can then spend in a variety of ways to help their children learn and develop. Eligible expenditures include private school tuition, textbooks, tutoring, educational therapies, and a host of other services to tailor education to the specific needs of the child. The state pays 90 percent of what it would normally pay to the child's school district or charter school, except in the case of low-income students, when it pays 100 percent. Because of the savings per student, the Arizona's Joint Legislative Budget Committee estimates the state will decrease expenditures over the next four fiscal years, with an annual savings of \$3.4 million in FY 2021.

Testing Requirements

The new law requires parents of ESA students enrolled in private schools in grades 3 through 12 to agree to have their child take annually one of the following assessments in reading and mathematics: a norm-referenced test, the statewide assessment, an advanced placement test, or a college admissions test. Tests

may be administered by a participating school or outside of school. If a participating school enrolls 50 or more ESA students, it must make available on its Web site or on request the aggregate scores of all its students on the aforementioned assessments. A network of schools may satisfy the requirements by publishing the scores by grade level of all schools in the network.

Supporters React

"When parents have options, students win," said Governor Ducey about the new law. "I'm incredibly proud to sign this legislation to give all students in Arizona, no matter where they live or what their circumstances are, an education that's best for them." The governor also noted, "The quality of a child's education should not be determined by what neighborhood their parents can afford to live in."

State Senator Debbie Lesko, who championed the bill, talked about the impact the measure will have in the state and across the nation: "This next generation of school choice will empower parents and children, not only in Arizona, but throughout the country, for today Arizona once again exerts its leadership as the education innovation catalyst for America. States across the country have followed our lead on school choice and they will now also follow our lead on providing families with true educational freedom."

Bill Oberndorf, chairman of the American Federation for Children, which strongly supported the measure, said the group was thankful that the governor had "handed every parent in Arizona the ability to truly customize their own child's education." He added, "No longer will students be trapped in any one school as parents will have greater opportunities to seek the best education for their children."

Former Florida Governor Jeb Bush, chairman of the Foundation for Excellence in Education, said: "This is an historic moment for the state of Arizona, its families, and most importantly the generations of students who will benefit from the power of finding the right educational option for their unique needs."

Even Education Secretary Betsy DeVos joined the chorus of praise. In a tweet sent out the night the bill was signed, she wrote: "A big win for students & parents in Arizona tonight with the passage of ed savings accts. I applaud Gov. @DougDucey for putting kids first."

[image © ultrakreativ / Adobe Stock]



Budget Deal

It was a long time coming, but congressional leaders announced May 1 they had reached agreement on a sweeping spending bill to fund the government through September 30, 2017.

Actually, the agreement should have been reached in time for the budget to take effect last October, but congressional friction forced a series of stopgap measures, called continuing resolutions, to fund the government up to now.

The good news is that most education programs are "forward funded," meaning the deal just reached includes money for programs in the coming 2017-18 school year.

Many private school leaders were eagerly awaiting appropriations for several programs authorized by the *Every Student Succeeds Act* (ESSA), some involving new funding formulas for calculating benefits to private school students and teachers.

Under Title I, for example, funds for private school services are now calculated based on a school district's total Title I allocation. Under the budget deal just reached, Title I grants will be funded at \$15.5 billion, an increase of \$550 million from FY 2016 (including \$450 million from defunct school improvement grants).

Title II-A, which funds professional development for teachers and administrators, also now requires school districts to set aside a proportionate share of their total allocation for services to private school personnel. The new budget agreement calls for \$2.1 billion for Title II-A, down \$294 million from FY 2016.

Another title affecting the private school community is the new Title IV-A grant program for "Student Support and Academic Enrichment," which provides schools with significant flexibility in meeting a broad array of needs. If the budget agreement is approved, the student support program will be funded at \$400 million.

CAPE notes

★ Talk about a book launch benefiting from fortuitous events. Arizona passes a broad education savings account initiative April 6 (see p. 3), and a team of editors releases the first definitive volume on ESAs on April 26.

Happy coincidence or brilliant design? Either way, this new collection of essays by scholars, researchers, and school choice advocates provides one-stop shopping for answers to questions about this popular new approach to school reform.

Edited by Nat Malkus and Gerard Robinson from the American Enterprise Institute and Adam Peshek from the Foundation for Excellence in Education, *Education Savings Accounts: The New Frontier in School Choice* includes nine essays that tackle topics such as: “Are ESAs constitutional? How will they change K–12 education in America? How hard are they to implement?”

Debbie Lesko, the Arizona senator who championed ESA legislation, called the book a “hands-on view of one of the most important conversations in school choice today.”

★ “How do we prepare the next generation to become active citizens, and what role do schools play in that process?” In a recent essay for *The 74*, Ashley Berner, deputy director of the Johns Hopkins In-

stitute for Education Policy and assistant professor at the School of Education, notes that while schools are not the only means for forming citizens, they are for many students the “first and most sustained experience with civic institutions.”

Moreover, multiple studies that examine the “school effect” on civic life find an “advantage in attending private schools.” Why? “Scholars disagree about which mechanisms matter most, but researchers believe that all of these have a role: social-capital creation, high expectations and rigorous academic programs, classroom environments that support deliberation and debate, strong normative school cultures, and school structures that engage parents.”

Berner writes that a “strong school culture” means “a school where the moral vocabulary, rituals, discipline, academic expectations, and relationships align. Such a school can define its mission, hire faculty, and attract students and parents based upon a shared vision.”

She concludes that “well-constructed state support for a diverse array of private schools is more likely to help than to hinder our national capacity to nurture students’ civic growth.”

★ President Trump signed an executive order April 26 stating that his administra-

tion’s policy is to “protect and preserve state and local control over the curriculum, program of instruction, administration, and personnel of educational institutions, schools, and school systems,” and directing Secretary of Education Betsy DeVos to review all Department of Education regulations and guidance to make sure they comply with laws that prohibit federal interference with areas of education subject to state and local control.

The secretary has 300 days to publish any proposed revisions to regulations that result from her review or to withdraw or modify guidance that she finds are inconsistent with statutory prohibitions against federal interference in education.

At a White House ceremony accompanying the signing, Secretary DeVos said, “It has been all of our experience that those closest to the problem are best equipped to solve it. That means empowering parents, teachers, state and local leaders—not the federal government.”



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